

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

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| In Re: |) | |
| |) | |
| BRUCE E. JOHNSON, |) | Case No. 01-15118 |
| KIMMA L. JOHNSON, |) | Chapter 7 |
| |) | |
| Debtors. |) | |
| _____ |) | |

MEMORANDUM AND ORDER

This matter is before the Court on Trustee's Renewed Objection to Debtors' Claim of Exemption (Doc. 46). The Court held an evidentiary hearing, and has reviewed the briefs submitted by the parties, as well as the arguments made at the hearing on this matter, and is now ready to rule. The court has jurisdiction over the parties and subject matter of this core proceeding pursuant to 28 U.S.C. §§ 1334, 157(a) and 157(b)(2)(A).

I. FINDINGS OF FACT

The Debtors, Bruce and Kimma Johnson, married in September, 1992. At the time they married, Bruce Johnson had an ownership interest in two tracts of real property located within the city limits of Kingman, Kansas. One property is located at 802 S. Poplar (hereinafter "Poplar"), and the other is located at 617 E. 4th Street (hereinafter "4th Street"). Both are situated on lots of less than one acre. There was no evidence whether Kimma Johnson's name was on the title to these tracts at the time of bankruptcy, but Mr. Johnson testified he thought it probably was.

Debtors separated in September 2001, at which time Kimma Johnson remained in the family's residence on 4th Street, and Bruce Johnson moved to the Poplar property. After that date, each debtor

maintained separate households, each paying the debt against the respective properties they were occupying.

On October 24, 2001, the Debtors filed a Chapter 7 joint bankruptcy petition. The Debtors listed both the Poplar and the 4th Street properties as exempt under the Kansas homestead exemption, K.S.A. 60-2301. Two months later, on December 28, 2001, the Debtors filed a divorce petition, and on March 8, 2002, a Journal Entry of Divorce was entered. The divorce court granted the 4th Street property to Kimma Johnson, and the Poplar property to Bruce Johnson, and ordered that each was to pay the respective mortgages on the property.

The fair market value of the 4th Street property is approximately \$17,400, and the debt against that property as of the date of bankruptcy was approximately \$6,600. The fair market value of the Poplar property is approximately \$13,000. The debt against that property, as of the date of bankruptcy, was approximately \$13,900. The Debtors contend that they are entitled to claim both properties as homesteads or, in the alternative, that the Poplar property is of inconsequential value and benefit to the estate and should be abandoned by the Trustee. Copies of the mortgages on the two tracts, which were attached to the two Proofs of Claim filed by the mortgagee, the State Bank of Kingman, show that both Debtors signed the mortgages on both properties.¹ Debtors chose to file bankruptcy, and seek two separate homestead exemptions, before filing for divorce to save the filing fee and attorneys fees associated with two filings.

¹At the evidentiary hearing on this matter, the parties indicated that the mortgages were held by Kanza Bank. However, the State Bank of Kingman is the entity that filed a Proof of Claim on each of these properties.

The Trustee has objected to the Debtors' attempt to exempt two separate pieces of real estate as homesteads. According to the Trustee, Kansas law only allows joint Debtors to declare one property as exempt. The uncontroverted evidence is that there is no equity in the Poplar property, as its value is less than the encumbrances against it. In addition, this house has no heating source except a heating stove in the kitchen which runs on natural gas, which is supplemented by a propane stove, and a wood burning stove. Because there is no central air conditioning or central heating source, the house is very cold in the winter and, likewise, very hot in the summer. This is not the type of house that appears to be readily marketable, let alone at a price in excess of its undisputed fair market value. In addition, the roof on the house leaks over the bathroom, kitchen and utility room, and the house likely needs to be re-roofed in its entirety.

The Trustee argued, without producing testimony or exhibits in support, that he thought he might be able to get some limited amount of money from the sale of redemption rights, or otherwise, if he prevailed on his motion. The evidence that the Trustee could net any money for the creditors in this case, however, was at best speculative, even if the Court treats the Trustee's remarks as evidence. The Trustee also indicated that he might be able to rent the property prior to any foreclosure proceedings. The Trustee did not, however, produce any evidence of the likelihood of being able to rent the property and, given the condition of the Poplar property, it appears unlikely that the Trustee would be successful in renting the property without first expending considerable amounts to repair the property.

The parties have each moved for attorney fees based upon conduct by opposing counsel on this matter.

II. ANALYSIS

A. The Poplar property is of inconsequential value and benefit to the bankruptcy estate and the Trustee is, therefore, ordered to abandon any interest in that property.

“On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” 11 U.S.C. § 554(b).² In order to approve a motion to abandon property, the bankruptcy court must find either that (1) the property is burdensome to the estate or (2) of inconsequential value and inconsequential benefit to the estate. See 11 U.S.C. § 554(b); *Morgan v. K.C. Mach. & Tool Co. (In re K.C. Mach. & Tool Co.)*, 816 F.2d 238, 245 (6th Cir. 1987). As the Sixth Circuit noted, “[a]n order compelling abandonment is the exception, not the rule. Abandonment should only be compelled in order to help the creditors by assuring some benefit in the administration of each asset.” *Morgan*, 816 F.3d at 246.

The Debtors have requested, in the event the Poplar property is not exempt, that the Court enter an order requiring the Trustee to abandon the Poplar property pursuant to 11 U.S.C. § 554(b). The Debtors claim that the Poplar property is of inconsequential value and benefit to the bankruptcy estate based on its lack of equity and poor condition.

It is undisputed that the Debtors have no equity in the Poplar property, as the amount remaining due on the mortgage exceeds the appraised value of the property by approximately \$900. However, the

² All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et. seq., unless otherwise specified.

Trustee argues that the Poplar property still has value to the estate because he might be able to rent the property during the redemption period, which could bring additional money into the estate. In addition, the Trustee also alleges that he might be able to sell the redemption rights to this property, which would also bring assets into the estate. The parties agree that because there is no equity in the property, the redemption period would be three months. *See* K.S.A. 60-2414(m) (1994) (redemption period for an owner of real estate is three months if the mortgage is foreclosed before one-third of the original indebtedness has been paid).

The Trustee contends that the bankruptcy estate would benefit from the inclusion of the Poplar property because he could receive rent payments from the property during the redemption period. According to the evidence presented by the parties and the appraisal completed by Byers Appraisal Service, the following problems exist with the Poplar property: (1) the exterior walls of the house need to be replaced, (2) at least a portion of the carpeting needs to be replaced, (3) the roof leaks into three separate rooms and likely needs to be replaced in its entirety, (4) there is no heating source except a heating stove in the kitchen that runs on natural gas, which is supplemented by a propane stove and a wood burning stove, and (5) because there is no central heating or air conditioning, the house becomes very cold in the winter and very hot in the summer. The Trustee failed to present any evidence concerning the housing market in Kingman, Kansas or the likelihood that this property could be rented at any time in the foreseeable future.

Another issue of concern for the Court is the length of the redemption period. According to the parties, the Trustee would have a redemption period of only three months in which to seek rental income from this property. Given the condition of this property and the lack of evidence concerning the possibility

of renting it in such a short period of time, and for such a short term, the Court finds that the Trustee's claim that the bankruptcy estate would benefit from rental income off this property is speculative, at best. "The court need not consider speculative factors when determining whether abandonment is appropriate under Section 554(b) of the Bankruptcy Code." *In re Nelson*, 251 B.R. 857, 860 (8th Cir. B.A.P. 2000) (citing *Vu v. Kendall (In re Vu)*, 245 B.R. 644, 649 (9th Cir. B.A.P. 2000)).

The second argument by the Trustee is that he could possibly sell the redemption rights to this property to the mortgage holder to bring proceeds into the estate. Although the sale or transfer of redemption rights is allowed under K.S.A. 60-2414(h), the Trustee provided no evidence concerning the likelihood of being able to sell this right or the potential value of the redemption right. If this property were subject to the twelve month redemption period contained in K.S.A. 60-2414(a), the Court might be more easily persuaded by the Trustee's unsupported argument that the redemption rights would be a valuable asset to the estate and that a mortgage holder would likely be willing to pay for those rights. However, given that the redemption period is only three months, the Court finds the Trustee's argument falls squarely within the realm of speculation. As such, the Court will not consider this argument when determining whether the Poplar property is of inconsequential value and benefit to the estate.

The Court finds that the Poplar property is of inconsequential value and benefit to the estate. There is no equity in the property and the Trustee's arguments concerning his ability to generate income from this property are speculative, at best. Therefore, the Court orders the Trustee to abandon any interest the estate may have in this property.

B. The Court need not decide whether the joint Debtors in this case are entitled to claim separate homestead exemptions under K.S.A. 60-2301.

Kansas has opted out of the federal exemption scheme provided in § 522(d) by enacting K.S.A. 60-2312, which limits its citizens to the exemptions provided under state law. *In re Carbaugh*, 278 B.R. 512, 521 (10th Cir. B.A.P. 2002). Therefore, the existence and extent of the Debtors' homestead exemption is governed by Kansas state law. *In re Hodes*, 287 B.R. 561, 566 (D. Kan. 2002) (citing *In re Kretzinger*, 103 F.3d 943, 945 (10th Cir. 1996) (holding that Oklahoma homestead laws were applicable in bankruptcy case because Oklahoma had opted out of the federal bankruptcy exemption scheme)).

The Kansas homestead exemption is both statutory and constitutional. *See* K.S.A. 60-2301 and Kan. Const. art. 15, § 9. Neither the language in K.S.A. 60-2301, nor the language in the Kansas Constitution, specifically addresses the issue of whether joint debtors, who are married but living in separate residences, can each claim a separate homestead exemption. Similarly, the issue has not been addressed in any reported or published case by the Kansas courts or any federal court. Therefore, the parties are asking this Court to determine, as a matter of first impression, an important statutory and constitutional issue that is based purely on Kansas state law.

Because the Court has already found that the Poplar property is of inconsequential value and benefit to the bankruptcy estate and that the Trustee is ordered to abandon any interest in the property, the Court does not need to address herein this important issue of Kansas law. The Court is unwilling to issue a purely advisory opinion concerning this important issue when the Kansas courts have not had the opportunity to consider it.

Furthermore, there would be no benefit to the parties if this issue were certified to the Kansas Supreme Court, nor would it be proper to certify this issue, as the ruling of the Kansas Supreme Court

would have no bearing on the outcome of this case. The Uniform Certification of Questions of Law Act, K.S.A. 60-3201 *et seq.*, provides that before the Kansas Supreme Court will answer a certified question, the question must be one “which may be determinative of the cause then pending...” *See* K.S.A. 60-3201 (1994). This Court has already determined that because the Poplar property should be abandoned, the answer to the question concerning two homesteads is not determinative. Therefore, this Court could not in good faith ask the Supreme Court to answer the question. Finally, the parties have expended enough time and resources on this issue given the relatively small amount of potential estate assets at stake, and requiring the parties to proceed with this issue before the Kansas Supreme Court, wherein additional costs, briefing and argument would be required, is not in the best interest of any interested party. *See* K.S.A. 60-3205 (1994) (stating “[f]ees and costs shall be the same as in civil appeals docketed before the Kansas supreme court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification”) and K.S.A. 60-3206 (1994) (stating “[p]roceedings in the Kansas supreme court shall be those provided in the court's rules and statutes governing briefs and arguments”).

C. Neither party will be awarded attorney fees in this matter.

Both parties have requested attorney fees in regard to this matter based on what they allege is inappropriate behavior by the other party. Based upon the facts and circumstances of this case, as detailed in the parties’ briefs and at the evidentiary hearing on this matter, the Court finds that an award of attorney fees and costs is not appropriate in this case. Therefore, both parties’ request for attorney fees is denied.

III. CONCLUSION

The Court finds that the property located at 802 S. Poplar in Kingman, Kansas is of inconsequential value and benefit to the bankruptcy estate. The property has no equity that could be brought into the estate through a sale. The Trustee's unsupported argument that he could generate revenue for the estate by either renting the property during the three month redemption period or selling the redemption rights was purely speculative and unpersuasive to the Court. Under the appropriate circumstances, a trustee may be able to show that rental income during the redemption period or proceeds from the sale of the redemption rights would be a valuable asset to a bankruptcy estate. However, those circumstances are clearly not present in this case based upon the condition of the property, the short period of redemption, and the lack of evidence from the Trustee concerning the likelihood of either renting the property during the three month period or selling the redemption rights. Therefore, the Trustee is ordered to abandon any interest in the property located at 802 S. Poplar, Kingman, Kansas.

Based on the Court's order that the Trustee must abandon any interest in the property, the Court need not decide the issue of whether joint debtors who are still married, but living apart, at the time of filing a joint bankruptcy may each claim a piece of real estate as exempt under the Kansas homestead exemption. Any ruling by the Court on that issue, which is controlled by Kansas statute and the Kansas Constitution, would have no bearing on the outcome of this case.

Neither party is entitled to attorney fees or costs in relation to this matter.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Trustee is to abandon any interest in the property located at 802 S. Poplar, Kingman, Kansas, as that property is of inconsequential value and benefit to the bankruptcy estate.

IT IS FURTHER ORDERED that the Trustee's Renewed Objection to Exemption is moot by virtue of the Court's ruling that the Trustee must abandon any interest he has in the Poplar property.

IT IS FURTHER ORDERED that both parties' requests for attorney fees are denied.

IT IS SO ORDERED this _____ day of March, 2003.

Janice Miller Karlin
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the Memorandum and Order was deposited in the United States mail, postage prepaid on this _____ day of March, 2003, to the following:

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